TOH AI SHI v. TALENT TEAM SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
JOHN LEE KIEN HOW JC
[CIVIL APPEAL NO: WA-12ANCvC-108-03-2020]
18 JULY 2022

Abstract – *A stakeholder sum is not to be confused with a booking fee. The former is a sum of monies staked to a third party to be held in trust while the latter is collected into the developer's pocket as the deposit to denote interest to form legal relations. In the absence of a booking fee, the liquidated ascertained damages (LAD) run from the date the contract is formalised.*

LAND LAW: *Housing developer – Delay – Enforcement of payments of liquidated ascertained damages – Allegations of delay of completion of property purchased, common facilities and delivery of vacant possession – Whether there was extension of time for completion of residential unit granted by Housing Development Board – Exact date when delay was to be calculated from – Whether time ran from date sale and purchase agreement was entered or from date deposit was paid by purchaser to developer*

LAND LAW: *Housing developer – Stakeholder sum – Purchaser and developer entered into sale and purchase agreement for purchase of residential property – Allegations of delay of completion of property purchased, common facilities and delivery of vacant possession – Exact date for calculation of liquidates ascertained damages – Whether calculated from date booking fee paid to developer – Whether sum paid stakeholder's sum or booking deposit – Whether booking fee paid*

CIVIL PROCEDURE: *Mode of commencement – Proceedings – Housing Controller approved extension of time for delivery of vacant possession of common facilities and for issuance of strata title – Purchaser seeking to dispute validity of extensions – Whether originating summons correct mode for challenging such decision – Whether purchaser should have mounted challenge through judicial review – Whether improper and abuse of court process*

This was an appeal against the decision of the Sessions Court Judge ('SCJ'). The suit was brought by the appellant to, among others, seek and enforce payments of liquidated ascertained damages ('LAD') over delayed completion of the property purchased and the common facilities and the delivery of the vacant possession to the appellant. The appellant was a purchaser of a residential unit in a development governed under the Housing Development Act (Control and Licensing) 1966 ('HDA') and the Housing Development Act (Control and Licensing) Regulations 2015. The appellant entered into a sale and purchase agreement with the developer ('first respondent') to purchase the residential unit. The second respondent

was a legal firm being sued under the said capacity as stakeholders of certain stakeholders sum. The SCJ held that (i) there was an extension of time for the completion of the residential unit granted by the Housing Development Board, from 36 months to 48 months. Time ran from the date the SPA was entered and not from the date the deposit was paid by the appellant to the first respondent; and (ii) the second respondent was the stakeholder of the stakeholder sum and as such, they were bound by cl. 30 of the SPA where there was nothing in the said clause that allowed for the stakeholder sum to be released for the purpose of paying any LAD. Dissatisfied, the appellant appealed. The issue in dispute was on the exact date when the delay was to be calculated from. The appellant's case was that the date ran from the day the booking fee was paid to the respondent whereas the first respondent's case was that it ran from the date the SPA was signed. The appellant relied on the Federal Court's decision in *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor and Other Appeals* ('*PJD Regency*') while the first respondent relied on the Court of Appeal's decision in *GJH Avenue Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah, Kementerian Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Ors and Other Appeals* ('*GJH Avenue*'). Before the hearing of the appeal, there was an initial issue regarding the appeal documents *ie*, the intitulement. The appellant, during the preparation of the appeal documents, had insisted to change the intitulement of the appeal to incorporate her counterclaim in the lower court.

Held (dismissing appeal):

(1) The appellant had, somewhere in the midst of the matter in the lower court, sought to file her counterclaim against the respondents. This was dismissed by the SCJ and there was no appeal filed therefrom. The matter then went on without the appellant's counterclaim in the picture. The illogical 'counterclaim' by a plaintiff (in this case the appellant) to an action which was unheard of, had rightfully been dismissed by the SCJ. This was absurd and could not be allowed. From that moment on, the 'counterclaim' was no more there. The matter proceeded without this 'counterclaim'. The appeal now concerned the decision of the SCJ in dismissing the main action. How could that counterclaim be allowed to be reflected in the intitulement? The insertion of this 'counterclaim' in the intitulement was disallowed. (paras 9, 10 & 11)

(2) While *PJD Regency* had overturned the *ratio* of *GJH Avenue* when the Federal Court decided that the date of the calculation of LAD began from the date the booking fee was paid to the developer and not the date of the agreement, there was a factually distinguishable material difference between the facts of this appeal and *PJD Regency*. The first respondent submitted that the sum of RM5,000 paid by the appellant was paid to Messrs Soh Hayati & Co as stakeholder's sum and not a booking deposit that was paid to the first respondent's pocket. Besides, it was clearly stated in the receipt that the sum of RM5,000 was

'payment of stakeholder sum'. There was also nothing in the SPA that provided that a booking fee was to be collected prior to the signing of the SPA. In the absence of a booking fee paid by the appellant to the first respondent, *GJH Avenue* was more relevant to the facts of this appeal. The court was not bound by the decision of *PJD Regency*. For the purpose of the calculation of the LAD, the time commenced from the date of the SPA on 1 October 2015. (paras 15, 16, 20, 21 & 22)

(3) The manner of delivery of vacant possession had been spelt out in cl. 27 of the SPA while cl. 29 of the SPA dealt with completion of common facilities. As could be read clearly in cls. 27 and 29 of the SPA, the SCJ rightly decided that there was nothing in the agreement between parties that mentioned a particular need to provide in detail in the architect's certification which common facilities had been completed. All that was necessary to meet the conditions of cl. 29(1) of the SPA was that a certificate of completion had been issued by the architect. This had been undoubtedly and undisputedly issued to the first respondent and received by the appellant as admitted in her affidavit. Given that the first respondent had delivered vacant possession of the common facilities on 8 July 2018 and the residential unit on 29 April 2019 to the appellant, the first respondent had fulfilled its obligations under cl. 27(1) of the SPA within the extension of time approved by the Housing Controller. Thus, it did not trigger the operation of cl. 29(3) of the SPA for LAD. (paras 29-31 & 33)

(4) It was undisputed that the Housing Controller had approved the extension of time for the delivery of vacant possession of the common facilities and for the issuance of strata title. The two extensions of time were valid in the eyes of the law. The appellant sought to dispute the validity of these two extensions in this action. However, this action, through an originating summons, was not the correct mode for challenging such decisions. If at all, the appellant should have challenged the validity of the extension through a judicial review exercise and quote the decision therefrom for this claim. It was improper and an abuse of the court process for the appellant to seek two different reliefs of two very different natures against two very different parties, which was exacerbated by the fact that the decision maker of the two extensions of time was not even made a party in the action. The appellant could not come to court asking for a relief in private law *ie*, the LAD, and at the same time expect a consecutive relief in public law *ie*, nullifying the extensions of time. (paras 36, 37, 49 & 81)

(5) The appellant's claim to utilise the stakeholder sum to pay the LAD due to her was not only illegal but would also affect valid defect claims from other purchasers under this clause. If such LAD claim was allowed to be paid from the stakeholder sum, the cloud on the horizon was the real

danger of exhausting the stakeholder sum for the residential unit and encroaching into the sums held for other purchasers and other units. In any circumstance, the court could not allow a claim that would prejudice the contractual rights of other purchasers as it was the duty of the court to safeguard public interest. (para 80)

Case(s) referred to:

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 CLJ 162 FC ***(dist)***

Datuk M Kayveas & Anor v. Bar Council [2013] 7 CLJ 533 FC ***(refd)***

Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd [1997] 1 CLJ 23 CA ***(refd)***

Embassy Court Sdn Bhd v. Yip Kum Fook & Ors; Prakash Hardasmal Khiani & Ors (Interveners) [2014] 10 CLJ 295 HC ***(refd)***

GJH Avenue Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah, Kementerian Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other Appeals [2020] 3 CLJ 307 CA ***(refd)***

Majlis Perubatan Malaysia & Anor v. Asia Pacific Higher Learning Sdn Bhd [2019] 5 CLJ 513 CA ***(refd)***

Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Cases [2021] 10 CLJ 596 HC ***(refd)***

Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Another Appeal [2022] 5 CLJ 251 CA ***(refd)***

PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals [2021] 2 CLJ 441 FC ***(dist)***

S.E.A. Housing Corp Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 FC ***(refd)***

SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener) [2022] 3 CLJ 339 FC ***(refd)***

Southville City Sdn Bhd v. Chua Teck Kee & Anor (No 2) [2019] 1 LNS 1318 HC ***(foll)***

Southville City Sdn Bhd v. Mohd Azlan Abu Bakar & Anor [2019] 1 LNS 1431 HC ***(refd)***

Toh Fong Cheng & Ors v. Pang Choon Kiat & Ors [2020] 1 LNS 2123 CA ***(refd)***

Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd [1987] 2 CLJ 26; [1987] CLJ (Rep) 400 SC ***(refd)***

TS Chong & Co v. Mount Austin Properties Sdn Bhd & Ors [2008] 5 CLJ 397 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25(2)

Housing Development Act (Control and Licensing) 1966, s. 22E, Schedule H

Rules of Court 2012, O. 15 rr. 2, 3, O. 53 rr. 1, 3, O. 55 r. 2

For the appellant - Aaron Pang Kok Kang; M/s Aaron Pang & Co

For the 1st respondent - Low Joo Hean & Suriyany Abd Majid; M/s Ching, Tan & Assocs

For the 2nd respondent - Syed Fadzil Alhabshi & Noraini Yacob; M/s Sidek Teoh Wong & Dennis

[Editor's note: Appeal from Sessions Court; Suit No: WA-A54-128-10-2019.]

Reported by Lina E

JUDGMENT

John Lee Kien How JC:

Introduction

[1] This is an appeal ("this appeal") against a decision made by the learned Sessions Court Judge after full hearing. The suit was brought by the plaintiff/appellant ("the appellant"), among other, to seek and enforce payments of liquidated ascertained damages ("LAD") over delayed completion of the property purchased and the common facilities and the delivery of the vacant possession to the appellant.

[2] The appellant is a purchaser of a residential unit ("the residential unit") in a development known as 'Ayuman Suites @ Gombak' ("Ayuman suites"), which is a residential project governed under the Housing Development Act (Control and Licensing) 1966 ("HDA 1966") and HDA Regulations 2015.

[3] The first defendant/respondent ("first respondent") is a developer responsible for the construction of the Ayuman suites whereas the second defendant/respondent ("second respondent") is a legal firm being sued under said capacity as stakeholders of certain stakeholder sum.

[4] It is an undisputed fact that the appellant and the first respondent have entered into a sales and purchase agreement under Schedule H of the HDA 1966 on 1 October 2015 to purchase the residential unit ("the SPA").

Decision Of The Subordinate Court

[5] The learned Sessions Court Judge decided that there was an extension of time for the completion of the residential unit granted by the housing development board from 36 months to 48 months. In interpreting the said extension of time, the learned Sessions Court Judge decided that time ran from the date the SPA was entered and not from the date the deposit was paid by the appellant to the first respondent. In support, the learned Sessions Court Judge relied on two cases namely the Court of Appeal decision of *GJH Avenue Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah, Kementerian Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other Appeals* [2020] 3 CLJ 307; [2019] MLRAU 288 and the High Court decision of *Southville City Sdn Bhd v. Mohd Azlan Abu Bakar & Anor* [2019] 1 LNS 1431; [2019] MLRHU 1070.

[6] It was also decided that the second respondent is the stakeholder of the stakeholder sum and as such, they are bound by cl. 30 of the SPA where there is nothing in the said clause that allows for the stakeholder sum to be released for the purpose of paying any LAD. The decision was supported by the case *TS Chong & Co v. Mount Austin Properties Sdn Bhd & Ors* [2008] 5 CLJ 397.

[7] Dissatisfied with the decision of the learned Session Court Judge, the appellant appealed to me. By virtue of O. 55 r. 2 of the Rules of Court 2012, I have reheard the submission of the parties.

This Court's Findings

[8] Having read the appeal records and parties' written submissions and having heard the oral submissions thereafter, I agree with the decision of the learned Sessions Court Judge and dismiss this appeal. Below are my reasonings and judgment for the dismissal of this appeal.

[9] Before the hearing of this appeal, there was an initial issue regarding the appeal documents: the intitulement. The appellant, during the preparation of the appeal documents in this case had insisted to change the intitulement of the appeal to incorporate her counterclaim in the lower court. To this, the respondents objected vehemently. Apparently, the appellant/plaintiff in this action, had somewhere in the midst of the matter in the lower court, sought to file her counterclaim against the respondents/defendants. This was dismissed by the learned Session Court Judge. No appeal was filed therefrom. The matter then went on without the appellant's/plaintiff's counterclaim in the picture. However, at the juncture of preparation of the appeal documents, the appellant was adamant in putting this in the intitulement of all appeal documents.

[10] It is my finding that this is absurd and cannot be allowed. The illogical 'counterclaim' by a plaintiff to an action which is unheard of, had rightfully been dismissed by the learned Session Court Judge. From that moment on, the 'counterclaim' was no more there. The matter then proceeded without this 'counterclaim'. The appeal now before me is concerning the decision of the learned Session Court Judge in dismissing the main action. How would that counterclaim be allowed to be reflected in the intitulement?

[11] Thus, the insertion of this 'counterclaim' in the intitulement is disallowed. Indeed, this needs not be dealt with by this court for its obvious reason. However, for the completeness of discussion, and as I put to the appellant's counsel in his argument to justify the 'counterclaim' by the appellant/plaintiff, such counterclaim is totally against logic and non-common sensible. In any civil claim, the plaintiffs would formulate and state their cases in their writs and statements of claims. Therefrom, the defendants would file their defences and counterclaims (if any). These counterclaims are meant for the defendants to put forward their claims in related matters against the plaintiffs and/or third parties. This is vividly the provision in O. 15 r. 2 and O. 15 r. 3 of the ROC 2012. There is no provision for the plaintiffs to put in their counterclaims for the obvious reason that there is no such need at all. Whatever claims the plaintiffs would have must have already been stated in the main suit/writ/claims. If the counterclaim is related with another matter, then, it should have been put in another and separate claim. If at all the defendants have their counterclaims against the plaintiffs, and the

plaintiffs therefrom would like to have their counterclaims against the defendants' counterclaims, then, and only then, it would be possible and judicious to have such counterclaim to counterclaim. This latter is not the case here.

[12] In our present case, the appellant/plaintiff filed her claim against the respondents/defendants. Then, suddenly, the appellant/plaintiff inserted a 'counterclaim' against the respondents/defendants!!! Aptly and rightfully, this odd and bizarre action/counterclaim was dismissed by the learned Session Court Judge. As mentioned earlier, no appeal whatsoever (perhaps for the obvious reason) was filed by the appellant/plaintiff against this decision. How could this curious and anomalous counterclaim by the appellant/plaintiff be allowed to be stated in the intitulement of this appeal? Hence, I have ordered that the intitulement of this appeal be amended to leave out the appellant's/plaintiff's (proposed) counterclaim. Now I shall discuss the crux of this appeal.

[13] The pith and substance of the appellant's case is that there was a delay in the delivery of the residential unit and the common area. The issue in dispute henceforth arose on the exact date when this delay is to be calculated from. The appellant's case is that the date runs from the day the booking fee was paid to the first respondent whereas the first respondent's case is that it runs from the date the SPA was signed.

[14] Respectively on this point, the appellant relied on the Federal Court case of *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441 and the first respondent relied on the Court of Appeal case of *GJH Avenue Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah, Kementerian Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other Appeals* [2020] 3 CLJ 307.

[15] While I am mindful that *PJD Regency* (*supra)* had overturned the *ratio* of *GJH Avenue* (*supra*) when the Federal Court decided that the date for the calculation of LAD begins from the date the booking fee was paid to the developer and not the date of the agreement, I agree with learned counsels for the first respondent that there is a factually distinguishable material difference between the facts of this appeal and *PJD Regency* (*supra*).

[16] The first respondent submitted that the sum of RM5,000 paid by the appellant was paid to Messrs Soh Hayati & Co as stakeholder's sum and not as a booking deposit that was paid to the first respondent's pocket. The distinction between these two terms was clearly defined by Mariana Yahya J (as she then was) in the case of *Southville City Sdn Bhd v. Chua Teck Kee & Anor (No 2)* [2019] 1 LNS 1318; [2019] MLRHU 957:

> [14] This court refers to cl. 1.2 of the IO where the first respondent was aware that the applicant is under no obligation to collect any payment before the property was opened for sale.

A The Stakeholder Sum was only released to the Applicant by the Stakeholder for the first respondent on 27.3.2014 after the SPA was signed by the Applicant and the first respondent.

By reading the above said provisions, this court is of the view that the Stakeholder Sum cannot be constituted as 'booking fee' and/or 'deposit' towards the sale and purchase of the Project.

B

[17] The appellant's submission ignored this argument from the first respondent. The only attempted rebuttal to address it was by stating that a deposit was paid *via* some sort of a 'booking form' and by inference, the payment made was a booking deposit that falls under the ambit of the *PJD Regency* (*supra*). I find this nothing to write home about.

C

[18] Even if the appellant's submission sufficiently addresses the point, the appellant failed to appreciate that there has never been any booking form. The 'booking form' aforementioned was merely a receipt issued by Messrs Soh Hayati & Co to the appellant which states very clearly that the sum of RM5,000 was made "being payment of stakeholder sum."

D

[19] The effect of this is that the sum of RM5,000 was agreed by both the appellant and the first respondent as the stakeholder sum and thus the manner to treat the sum is subjected to the provisions of cls. 30(2) and (3) of the SPA. It was never a booking fee, nor was it paid to the first respondent for such purpose.

E

[20] The first respondent also correctly pointed out that there is nothing in the SPA that provides that a booking fee is to be collected prior to the signing of the SPA.

F

[21] These two facts when taken together make it clear that the judgment of *Southville City Sdn Bhd* (*supra*) is applicable and relevant to this appeal. Therefore, it cannot be said that a booking fee has been paid by the appellant to the first respondent. Rather, the payment of RM5,000 was paid to Messrs Soh Hayati & Co as stakeholder. It is clearly stated in receipt that the sum of RM5,000 was "payment of stakeholder sum."

G

[22] In the absence of a booking fee being paid by the appellant to the first respondent, the judgment of *GJH Avenue* (*supra*) is more relevant to the facts of this appeal. Thus, our present case is factually distinguishable from the case of *PJD Regency* (*supra*). I am thus not bound by the decision in *PJD Regency* (*supra*), and it is my judgment that for the purpose of the calculation of the LAD, the time commences from the date of the SPA on 1 October 2015.

H

[23] Flowing from the above, the issue of late delivery of vacant possession now comes to the fore.

I

[24] It is the appellant's submission that payment of LAD is due and owing from the first respondent for the late delivery of the residential unit and common facilities by 296 days based on cl. 25(2) of the SPA which reads:

If the Developer fails to deliver vacant possession of the said Parcel in the manner stipulated in clause 27 within the time stipulated in subclause (1), the Developer shall be liable to pay to the Purchases liquidated damages calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price from the expiry of the period stipulated in subclause (1) until the date of the Purchaser takes vacant possession of the said Parcel.

[25] The appellant then submitted in length that the learned Sessions Court Judge erred in this calculation because the delivery date for vacant possession of the common facilities on 8 July 2018 was unilaterally and arbitrarily extended, without notice to the appellant, by the housing controller from 36 months to 48 months *ie*, to 30 September 2019.

[26] The appellant also submitted in particular detail that the architect's letter issued was "ambiguous and left doubts as to the extent to which common facilities were completed".

[27] Meanwhile, the first respondent contended that there was no error to the Sessions Court judgment as the correct procedure and approval was obtained from the housing controller.

[28] For context, despite the convoluted submission of the appellant, the delay in dispute was regarding the delivery of vacant possession of common facilities and failure to deliver a strata title registered under the appellant's name.

[29] The manner of delivery of vacant possession has been spelt out in cl. 27 of the SPA which reads as follows:

Manner of delivery of vacant possession

27. (1) The Developer shall let the Purchase into possession of the said Parcel upon the following:

(a) the issuance of a certificate of completion and compliance;

(b) the separate strata title relating to the said Parcel has been issued by the Appropriate Authority;

(c) water and electricity supply are ready for connection to the said Parcel;

(d) the Purchaser having paid all monies payable under subclause 5(1) in accordance with the Third Schedule and all other monies due under this Agreement and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement; and

(e) the completion of any alteration or additional work under subclause 15(2), if any.

[30] Whereas cl. 29 of the SPA which deals with completion of common facilities is reproduced here:

> Completion of common facilities
>
> 29. (1) The common facilities serving the said housing development, which shall form part of the common property, shall be completed by the Developer within thirty-six (36) months from the date of this Agreement. The Developer's architect shall certify the date of completion of the common facilities and a copy of the certification shall be provided to the Purchaser.
>
> (2) If the Developer fails to complete the common facilities in time, the Developer shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centum (20%) of the purchase price.
>
> (3) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Developer completes the common facilities together with the architect's certification.

[31] As can be read clearly in cls. 27 and 29 of the SPA, the learned Sessions Court Judge rightly decided that there is nothing in the agreement between parties that mentions a particular need to provide in detail in the architect's certification which common facilities have been completed. All that is necessary to meet the conditions of cl. 29(1) of the SPA is that a certificate of completion has been issued by the architect. This has been undoubtedly and undisputedly issued to the first respondent and received by the appellant as admitted in her affidavit.

[32] It is trite law that the court is not in the business of rewriting agreements between parties. The court is vested only with the judicial power of interpreting agreements in its plain meaning of the words and enforcing the obligations it renders upon parties, no matter how distasteful its effects may bring. (See the judgment of Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd* [1997] 1 CLJ 23; [1997] 1 MLJ 587).

[33] Therefore, given that the first respondent has delivered vacant possession of the common facilities on 8 July 2018 and the residential unit on 29 April 2019 to the appellant, the first respondent has fulfilled its obligations under cl. 27(1) of the SPA within the extension of time approved by the housing controller. Thus, it does not trigger the operation of cl. 29(3) of the SPA for LAD.

[34] In that effect, it is my finding that the appellant has no cause or basis to claim for LAD in prayers (a) to (e).

[35] For the sake of completeness, I will also address the issue of validity of extension of time granted by the housing controller to the first respondent since it was severely attacked by the appellant.

[36] It is undisputed that the housing controller has approved the extension of time for the delivery of vacant possession of the common facilities *vide* a letter dated 16 November 2015, and the extension of time for the issuance of strata title *vide* letter dated 7 May 2019. However, the appellant sought to dispute the validity of the two extensions of time that were approved or granted by the housing controller in this action.

[37] On that point, I agree with the first respondent's submissions that this action, through an originating summons, is not the correct mode for challenging such decisions. If at all, the appellant should have challenged the validity of the extension through a judicial review exercise and quote the decision therefrom for this claim. It is only proper for all relevant parties be made to answer this allegation through a judicial review exercise and not in an originating summons.

[38] The appellant sought to rely on the authority of the Federal Court decision in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162. However, the case of *Ang Ming Lee* (*supra*) can be distinguished with this case before me from its mode of action.

[39] The case of *Ang Ming Lee* (*supra*) was a judicial review application that also named the Ministry and Minister of Urban Wellbeing, Housing and Local Government, and Controller of Housing as the respondents where the appellant sought to declare that a regulation of the HDA 1966 as *ultra vires*, the extension of time made by the controller was unappealable, denied certain rights of the appellant, and that the extension of time granted was signed under the wrong authority. In short, it was a review of the legality and validity of the authority exercised by a Government authority.

[40] Whereas the case of the appellant before me is a case for certain damages under an agreement to be paid to the appellant by reason of the first respondent's alleged late delivery of a residential parcel and its attached common facilities. There is nothing in the reliefs prayed by the appellant that seeks for this court to impugn the decision of the controller on the extension of time. Yet in the appellant's submission, the two extensions of time were attacked and quoted as null and void.

[41] On this point, I agree with the decision of Mohd Firuz Jaffril J in the case of *Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Cases* [2021] 10 CLJ 596 at p. 614:

> [36] It is my considered view that *the plaintiffs' conduct in filing this suit to seeking inter alia a declaration that the EOT granted by the defendants herein null and void pursuant to the Federal Court decision in Ang Ming Lee (supra), is improper and an abuse of court process. Firstly, an application to challenge a decision of a public authority ie, the Minister and/or the Housing Controller must be made by way of judicial review. Secondly, the plaintiffs' suit was only limited to the developer and did not include the Minister and/or the Housing Controller whose*

decision in allowing the EOT is being challenged. With reference to this issue, I am of the opinion that the non-inclusion of the Minister and/or Housing Controller as parties is fatal as both the Minister and/or the Housing Controller must be given the right to be heard (better known as the "*audi alteram partem*" principle as explained by the Federal Court in *Dr Lourdes Dava Raj Curuz Durai Raj v. Dr Milton Lum Siew Wah & Anor* [2020] 9 CLJ 192; [2020] 5 MLJ 185). *Thus, the plaintiffs' application for a declaratory order that the EOT given was null and void is flawed and irreparable. As held by the Federal Court in Ang Ming Lee, the absence of any affidavit from the Minister had fortified its finding that there was no decision from the Minister (see paras. 65 to 68). This further reinforces my view that that the Minister should rightly be named as a party by the plaintiffs in challenging the EOT.* (emphasis added)

[42] At the time of my decision, the Court of Appeal had yet to deliver its decision regarding the appeal of *Obata Ambak* (*supra*). The decision was only delivered shortly prior to the writing of this judgment. In any event, it is noteworthy that the Court of Appeal on appeal of *Obata Ambak* (*supra*) did not reverse or affirm on this point and has dismissed the appeal because the action was time barred (see decision of Azizah Nawawi JCA in *Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Another Appeal* [2022] 5 CLJ 251).

[43] The factual matrix of the appellant's case is similar, if not identical, to *Obata Ambak* (*supra*). Through this private action, the appellant prayed to the trial court and to this court for LAD to be paid. In the same breath, the appellant also sought for this court to make a finding that the extension of time was invalid and wrought with invalidity under the authority of *Ang Ming Lee* (*supra*).

[44] If the appellant was dissatisfied with the decision of the controller, a judicial review should have been filed within three months from the decision (O. 53 r. 3 of the Rules of Court 2012). There is no evidence that this was done but as the proceedings commenced it seems that the appellant has changed her mind and now through this case wanted to challenge the controller's decision. Alas, she is out of time and in an effort to circumvent this procedural obstacle, this application was filed. Such backdoor approach cannot be condoned by this court.

[45] Learned counsel for the appellant gravely misconstrued the law in his submission that the manner of commencement is immaterial in the face of a *ratio decidendi* from the apex court that supports his case *ie*, *Ang Ming Lee* (*supra*). I must correct this notion as mode of commencement is part and parcel of how the law must operate and should operate.

[46] On this point, I refer to *Majlis Perubatan Malaysia & Anor v. Asia Pacific Higher Learning Sdn Bhd* [2019] 5 CLJ 513; [2019] 1 MLJ 471 where Nallini Pathmanathan JCA (as she then was) held that:

> [48] What may be gleaned from the cases cited above is that where a claim bears both public and private law features the dominancy of either should determine the mode to be adopted. **If the primary and dominant purpose is to challenge the exercise of a public law right, then judicial review is the proper mode**. O. 53 as it now stands allows for the assessment of damages fully. In point of fact O. 53 has been expanded to include an entire armament of procedural devices that were normally features of a private law claim, for example injunctive relief and damages. In its modern form it is more than suitable to accommodate a claim for damages.
>
> (emphasis added)

[47] The Court of Appeal in *Asia Pacific Higher Learning* (*supra*) expounded the mode of commencement relies on whether a claim bears dominantly public or private law. If it is dominantly public law, then judicial review is the correct mode *vis-a-vis* a writ or originating summons if it is dominantly private law. It is the claimant's onus to assess, of the two, which is more dominant and to commence the suit with the correct mode. Since the relief sought by the appellant here is for the LAD and in her argument, she has alleged that the two extensions of time granted by the housing controller were not valid/proper, judicial review should be commenced. The appellant had not done so. Rather, without even such attempt, she is now coming to the court asking the court to award her the LAD on the basis that the extension was invalid or void. Without a finding from a judge of a competent court beforehand, how could such extension/decision made by a public authority be taken to be invalid or void? Hence, the total failure in the appellant's case for the LAD here.

[48] The consequences of not complying with this requirement as decided in *Obata Ambak* (*supra*) is that the attempt to declare the two extensions of time as null and void is improper and an abuse of the court process.

[49] It is my considered opinion that this is very much the situation before me. It is improper and an abuse of the court process for the appellant to seek two different reliefs of two very different natures against two very different parties, which is exacerbated by the fact that the decision maker of the two extensions of time is not even made a party in the action. The appellant cannot come to court asking for a relief in private law *ie*, the LAD, and at the same time expecting a consecutive relief in public law *ie*, nullifying the extensions of time. Therefore, I cannot agree with the appellant's contention on this.

[50] In addition to the above, there comes the question of whether the learned Sessions Court Judges can make a declaration or decision to annul a statutory decision. It is this court's findings that the answer is in the negative.

[51] Under s. 25(2) of the Courts of Judicature Act 1964 reading together with O. 53 r. 1 of the Rules of Court 2012, a judicial review and reliefs sought under it can only be applied in and granted by the High Court.

[52] This principle was analysed in length by the Federal Court in *SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener)* [2022] 3 CLJ 339 where the Federal Court explained the difference between statutory and constitutional judicial review and after the lengthy explanation, the Federal Court concluded as follows:

> [47] At the risk of repetition, in line with decided cases, the judicial power of the Federation which includes judicial review (constitutional and statutory) is vested by constitutional design solely in the two High Courts.

[53] From the *SIS Forum* (*supra*) case, it is clear that judicial review is a power only conferred on the High Court. The appellant has misconstrued the law in her submissions to assume that the Sessions Court will be able to entertain her claims that the extension of time granted by the housing controller is automatically null and void only by virtue of *Ang Ming Lee* (*supra*). The appellant cannot simply claim a judicial review or seek to challenge or allege that a decision exercised with statutory powers was void or invalid without first praying and obtaining a declaration of this. The action here (including the allegation that the two extensions of time were invalid or improper) is also filed through the wrong mode at the wrong court.

[54] It is improper and an abuse of the court process for the appellant to simply seek for the LAD by alleging the two extensions of time as invalid while the housing controller is not even made a party in the action. Therefore, I cannot agree with the appellant's submission on this point. Without any finding or declaration by a competent court that the two extensions of time were in anyway done wrongly, it remains valid, and it cannot be annulled or challenged in such manner.

[55] Hence, it is my finding, as the two extensions of time approved by the housing controller are valid, the appellant's claim for LAD in prayers (a) to (e) is baseless for the obvious reason that vacant possession was delivered within time.

[56] I will now deal with the last point relating to the appellant's claim against the second respondent to compel the second respondent to release the stakeholder sum as payment for the LAD claimed by the appellant.

[57] The condition for the release of the stakeholder sum has been agreed upon in cl. 30(3) of the SPA where the relevant part of the clause reads as follows:

> ... the Developer's solicitors shall not release to the Developer the relevant sum held by the Developer's solicitors as stakeholders under item 5(a) or (b) of the Third Schedule, as the case may be, until the Developer's solicitors shall have received a certificate signed by the Developer's architect certifying that such defect, shrinkage or other faults in the said Parcel or the said Building or the said common facilities have been repaired and made good by the Developer.

[58] Now, the appellant has vehemently argued that the first respondent, as the developer of the residential unit and the Ayuman suites, has unfettered contractual right to deduct any monies forming part of the LAD from any instalment of the purchase price due to the first respondent. The appellant relied on cl. 25(3) of the SPA:

> (3) The Developer shall pay any liquidated damages referred to in subclause (2) to the Purchaser immediately after the Developer has given notice requesting the Purchaser to take possession of the said Parcel in the manner stipulated in clause 27, failing which the Purchaser shall be entitled to deduct such liquidated damages from any instalment of the purchase price due to the Developer.

[59] The appellant relied on the case of *S.E.A. Housing Corp Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305 to support her claim where in the aforementioned case the purchasers were allowed to set off the LAD against the 10% balance purchase price to be paid to the developer.

[60] The second respondent replied succinctly that they are under statutory obligation to comply with the provisions of s. 22E of the HDA 1966 and cl. 30(3) of the SPA, failing which, the second respondent will be guilty of an offence under the Act:

> 22E. Release of moneys by a stakeholder
>
> (1) Any stakeholder who releases any money to a housing developer or to any other person knowing that such an act is contrary to the provisions of the sale and purchase agreement shall be guilty of an offence and shall, on conviction, be liable to a fine which shall not be less than ten thousand ringgit but which shall not exceed one hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.
>
> (2) Any person who knowingly and willfully aids, abets, counsels, procures, or commands the commission of an offence against subsection (1) shall be liable to be punished with the punishment provided for the offence.

[61] With respect, I must disagree with the appellant that the case of *S.E.A Housing Corp* (*supra*) is a relevant decision to the case at hand. In *S.E.A Housing Corp* (*supra*) it was held that the balance purchase price can be set off and be paid to the developer. This is consistent with cl. 25(3) of the SPA:

> ... any instalment of the purchase price due to the Developer

[62] However, the stakeholder sum held by the second respondent, although constitutes part of the purchase price, is governed by cl. 30(3) of the SPA and its conditions for release is clearly outlined in the clause. Moreover, the duties and obligations of a stakeholder is a statutory function under s. 22E of the HDA 1966. These salient features of a stakeholder sum are not at all applicable to the 10% balance purchase price. In another word, the court may upon application by the purchaser order a developer to pay

A the LAD or set off any payment for the purpose of LAD but such order cannot encroach the stakeholder sum. A stakeholder sum can only be utilised strictly following the instruction agreed upon by the parties at the time it was paid. It is the professional duty of the stakeholder to utilise the stakeholder sum for the purpose and in accordance with the stakeholder(s)' instruction.

B **[63]** The duties of the solicitors as the stakeholders under s. 22E of the HDA 1966 have been decided in numerous cases. Pertinently, the Federal Court has outlined such duty in the case of *Datuk M Kayveas & Anor v. Bar Council* [2013] 7 CLJ 533; [2012] 5 MLRA 442, where Jeffrey Tan FCJ held:

C > [31] ... When solicitors hold funds as stakeholders, they hold those funds as trustees and not in a contractual or quasi-contractual capacity (see *Alimand Computer Systems Ltd v. Radcliffes & Co*, The Times 6 November 1991).
>
> ...
>
D > "Once a solicitor holds money in trust for his client or any other party for a purpose, it does not matter whether the amount is sufficient to be utilised for that purpose. The money remains to be in trust" (*Selvaratnam Velupillai v. Dr Jayabalan Karrupiah* [2009] 1 CLJ 872; [2009] 1 MLJ 794 per Zaki Azmi CJ, delivering the majority judgment of the court). *Therefore, it is beyond argument that a stakeholder is a trustee and that the breach of a*
E > *stakeholding term is not just a breach of undertaking but also a breach of trust*.
>
> (emphasis added)

[64] The High Court in *Datuk M Kayveas* (*supra*) then applied the Federal Court decision in *Embassy Court Sdn Bhd v. Yip Kum Fook & Ors; Prakash Hardasmal Khiani & Ors (Interveners)* [2014] 10 CLJ 295 at pp. 302 to 303 that
F no compulsion can be made to a solicitor to release a stakeholder sum without the consensus of the parties and without satisfying that the obligations was fulfilled:

G > [22] Since the owners/purchasers, including the interveners have given the requisite notices under cl. 30 or cl. 29 of the SPA, as the case may be, and the plaintiff and defendant have acknowledged the same, *the stakeholders cannot release the sum held by them without the consensus of both the plaintiff and the purchasers. Without such consensus, the defendants cannot be compelled to release the sum to the plaintiff. Otherwise, the defendants would be committing an offence under s. 22E of the Act*.
>
H > (emphasis added)

[65] With the provisions of cl. 30(3) of the SPA spelling out specific and clear conditions for the release of the stakeholder sum and the explicit prohibition under s. 22E of the HDA 1966, any attempt to act contrarily to the conditions laid out in the SPA, would cause the maxim *ex turpi causa non*
I *oritur actio* jumping into action. This court must decline to intervene when a man finds his cause of action upon an immoral or illegal act. This court will not lend aid to transgress laws of the country nor compel a party to do so.

[66] The appellant through the originating summons was pressing the learned session judge and on appeal, is pressing this court to order the second respondent to release a sum which is being held in trust by the second respondent as a stakeholder. The appellant sought to have the said sum be released and paid to the appellant had the LAD claims in prayers (a) to (e) be allowed.

[67] If the second respondent were to release or were to be ordered by this court to release such a stakeholder sum, the second respondent has committed at least three breaches namely relating to its professional, fiduciary, and statutory duties. Firstly, the second respondent has failed to honour its undertaking, which is *prima facie* tantamount to a professional misconduct. The partners of the second respondent would be liable to any disciplinary action from the advocates and solicitors disciplinary board with potential penalty ranging from suspension, or worse, to being struck off the roll.

[68] The profession of an advocate and solicitor is a noble one, steep in honour and trust, where one advocate or the general public can trust a promise undertaken by another advocate at face value. So much so that breaking one's word is considered misconduct known as breach of undertaking.

[69] The Federal Court in *Datuk M Kayveas* (*supra*) succinctly summarised the position of the law in the context of breach of undertaking as a stakeholder:

> [31] ... Therefore, it is beyond argument that a stakeholder is a trustee and that the breach of a stakeholding term is not just a breach of undertaking but also a breach of trust.

[70] The Court of Appeal in *Toh Fong Cheng & Ors v. Pang Choon Kiat & Ors* [2020] 1 LNS 2123 at pp. 32 to 33 illustrated the liability of breach of undertaking of releasing a stakeholder sum to the wrongful party:

> [107] Even in a case where the Legal Firm is solicitors for the developer, it would still in the circumstances of this case, owe a duty of care to the plaintiff purchaser. What does the Legal Firm agree to do by accepting the said payment into its client's account? It agreed to make payment to the vendor after the necessary confirmation to the plaintiff purchaser that the Property is free from all encumbrances and that there is no redemption attached to the Property that had not been paid as is normal conveyancing practice. At the very least, upon the issuance of the CCC, it would be making payment to the developer.
>
> [108] It has assumed responsibility to the plaintiff purchaser in its capacity as solicitors on whom the plaintiff has reposed his trust to discharge that responsibility with reasonable care and skill and certainly not to release it to an unauthorised third party as was the case here and immediately upon the very next day the sum of RM1.5 million.

A [109] That would be a breach of its duty of care which it owes the plaintiff. The plaintiff had a clear legal and legitimate expectation that the purchase price paid would not be released to an unauthorised third party. Breach of that duty would cause loss to the purchaser as the vendor had refused to deliver vacant possession to the purchaser and it is no comfort to the purchaser that his only recourse is to sue the developer vendor who had
B subsequently gone into liquidation.

[71] From the decision of *Toh Fong Cheng* (*supra*), it can be seen that an unauthorised release of stakeholder will incur the second respondent liability for breach of trust. While the decision in *Toh Fong Cheng* (*supra*) only discusses about releasing it to a third party, it is crucial to add here that the
C stakeholder sum must strictly be utilised for the purposes mentioned and agreed upon by all the parties and not as per the wish of the appellant alone. Under the SPA, the second respondent has assumed a responsibility to hold the stakeholder sum in trust. Should the second respondent release the stakeholder sum not in accordance with the SPA, not only will the second
D respondent's partners be held accountable, but also the appellant herself and the rest of the purchasers will find it difficult to seek recourse for the purpose of this stakeholder sum specifically mentioned in the SPA: to utilise the stakeholder sum to remedy any defects discoverable during the defect liability period. The stakeholder sum is held by the second respondent for
E that purpose for all the purchasers of the units in the entire residential project. The second respondent would obviously be skating on thin ice and breach its trust if the stakeholder sum is to be released for any reason not mentioned in cl. 30(3) of the SPA.

[72] Secondly, the second respondent would have breached its fiduciary
F duty if the stakeholder sum is released to the appellant as payment for the LAD. The fiduciary duty of the second respondent comes in extension of the duty as trustees mentioned above. This was decided by Hashim Yeop A Sani SCJ in the Supreme Court case of *Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd* [1987] 2 CLJ 26; [1987] CLJ (Rep) 400
G (at p. 402); [1988] 1 MLJ 116 (at p. 118E); [1987] 1 MLRA 167 (at p. 168 (para 3)):

> In any particular case of sale and purchase, whether a person receiving the deposit is to be considered as an agent for the vendor or for the purchaser or for both as principal or as trustee is a question of law depending on
H the circumstances of the transaction as a whole. The learned judge concluded that in this case the appellant received the deposit as agent for the respondents in **a fiduciary capacity and therefore on general principles he would be accountable**. (emphasis added)

[73] This was later reaffirmed by the Federal Court in *Datuk M Kayveas*
I (*supra*):

> [14] ... and in accord with the view of the High Court that breach of a stakeholding is a breach of a fiduciary duty, Low Hop Bing JCA fell back on *Toh Theam Hock v. Kemajuan Perwira Management Corporation Sdn Bhd*

[1987] 2 CLJ 26; [1988] 1 MLJ 116, *Dato' Seri Au Ba Chi & Anor v. Malayan United Finance Bhd. & Anor* [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460; [1989] 3 MLJ 434, *Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor* [1983] 1 MLJ 256, *OCBC Bank (M) Bhd v. Lee Fah & Ors And Another Appeal* [2000] 1 CLJ 71; [2000] 1 MLJ 134 and *Selvaratnam a/l Vellupillai v. Dr Jayabalan Karrupiah* [2009] 1 CLJ 872; [2009] 1 MLJ 794, and said:

> In our view, the factual background attracts the application of the principles of law regulating stakeholders. The breach of duty by the appellants as stakeholders is not a mere breach of contract. *The relationship between the appellants (stakeholders) and the vendor and the purchaser is fiduciary in nature, existing between trustees and beneficiaries. Therefore, the appellants' breach of duty as stakeholders is a breach of duty as trustees. It is a breach of fiduciary duty*. (emphasis added)

[74] From the authorities of *Toh Theam Hock* (*supra*) and *Datuk M Kayveas* (*supra*), it is crystal clear that a fiduciary duty exists in a relationship between the stakeholders and the purchasers and vendors of sale and purchase agreements. The second respondent has a duty to exercise utmost care and diligence to ensure that the stakeholder sum does not fall into the wrong hands, or in the rights hands at the wrong time or for the wrong purpose.

[75] Should I have made an order for the second respondent to release the stakeholder sum as sought by the appellant, such order will only be adding another notch to their stream of grounds for disbarment and legal liability arising from such a perilous decision.

[76] Lastly, should an order be made to release the stakeholder sum for the payment of the LAD, the second respondent would also have breached its statutory duties. At the risk of repetition, I reiterate that the second respondent upon releasing the stakeholder sum to the appellant, would have breached s. 22E of the HDA 1966. The second respondent would have committed an offence under the HDA 1966 where upon conviction is punishable of a fine between RM10,000 and RM100,000 or imprisonment for a maximum of five years or both.

[77] In the appellant's crusade to ensure the rights of the appellant under the SPA, I find that the appellant's claim to utilise the stakeholder sum to pay off the LAD cannot be condoned as it impinges on the rights of other purchasers. It is my finding that should the stakeholder sum be utilised in the manner that the appellant is seeking, it will infringe the very purpose of such stakeholder sum and would do injustice to the other purchasers.

[78] As mentioned earlier, the purpose of the stakeholder sum, as prescribed in cls. 30(2) and (3) of Schedule H of the HDA 1966, is mainly to be utilised to repair any defects pursuant to the defect liability claim:

> (2) If the defect, shrinkage or other faults in the said Parcel or the said Building or the said common property have not been made good by the Developer within thirty (30) days referred to in subclause (1), the

> Purchaser shall be entitled to carry out the works to *repair and make good such defect, shrinkage or other faults himself and to recover from the Developer the costs of repairing and making good the same and the Purchaser may deduct such costs from any sum which has been held by the Developer's solicitors as stakeholders under item 5 of the Third Schedule*, provided that the Purchaser shall, at any time after the expiry of the period of thirty (30) days, notify the Developer of the costs of repairing and making good such defect, shrinkage or other faults before the commencement of the works ...
>
> In such an event, the Developer's solicitors shall release such costs to the Purchaser from the stakeholder sum held by the Developer's solicitors under item 5 of the Third Schedule within thirty (30) days after the receipt by the Developer's solicitors of the Purchaser's written demand specifying the amount of such costs. (emphasis added)

[79] Clause 30(2) above clearly spells out that the stakeholder sum is be utilised for the purpose of making good defects, shrinkage and other faults. There is nothing in the clause that spell out or authorise that the stakeholder sum can be utilised for payment of LAD.

[80] The appellant's claim to utilise the stakeholders sum to pay the LAD due to her, not only is illegal, but also will affect valid defect claims from other purchasers under this clause. If I were to allow such LAD claim to be paid from the stakeholder sum, the cloud on the horizon is the real danger of exhausting the stakeholder sum for the residential unit and encroaching into the sums held for other purchasers and other units. In any circumstance, I cannot allow a claim that will prejudice the contractual rights of other purchasers as it is the duty of the court to safeguard the public interest. On that basis, prayer (f) must be dismissed.

Conclusion

[81] To summarise, the appellant's case must be dismissed, and the decision of the learned Sessions Court Judge is to be upheld due to the reason that there was no late delivery of vacant possession on part of the first respondent. The calculation of LAD begins from the date the SPA was signed by the parties. A stakeholder sum is not to be confused with a booking fee. The former is a sum of monies staked to a third party to be held in trust, while the latter is collected into the developer's pocket as the deposit to denote interest to form legal relations. In the absence of a booking fee, the LAD? runs from the date the contract is formalised *ie,* the date of the SPA and not from the time RM5,000 stakeholder sum was paid to Messrs Soh Hayati & Co. The two extensions of time approved by the housing controller are also valid in the eyes of the law. The combination these two facts leads to my finding that the residential unit and the common facilities of Ayuman suites were delivered in time. Thus, there is no basis for the appellant claiming for the LAD in prayers (a) to (e).

[82] This court is also not able to accede to prayer (f) of the appellant's claim. Any attempt to compel the second respondent to release the stakeholder sum held in trust is an illegal act. Should this court allow prayer (f), on the authority of several decisions of the apex court, the second respondent would commit numerous breaches of professional, fiduciary, and statutory duties for its failure to ensure that the stakeholder sum was released in accordance with agreed terms and conditions outlined in the SPA. At the very least, the second respondent would be suspended, or even, disbarred. The court is duty-bound to prevent such transgressions. Thus, this appeal is dismissed with costs.